Supreme Court, U. S.
FILED
DEC 15 1980
MICHAEL RODAK, JR., CLERK

80-964

No.

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1980

COMMONWEALTH OF KENTUCKY - Petitioner

versus

BARBARA NEWSOME and
GLORIA FAYE NEWSOME - - - Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

STEVEN L. BESHEAR
Attorney General
ROBERT L. CHENOWETH
Deputy Attorney General
PATRICK B. KIMBERLIN, III
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Counsel for Petitioner

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTION PRESENTED

Whether the Kentucky Supreme Court misinterpreted and misapplied *McKiever* v. *Pennsylvania,* 403 U. S. 528 (1976) and *In Re Gault,* 387 U. S. 1 (1967), when it held that a juvenile is entitled to present evidence during the probable cause phase of a Kentucky Juvenile Transfer Hearing as a matter of Due Process of Law and fundamental fairness.

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IN THE

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No. _____

COMMONWEALTH OF KENTUCKY - - *Petitioner*

v.

BARBARA NEWSOME and
GLORIA FAYE NEWSOME - - - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

STATEMENT OF PARTIES IN COURT BELOW

The parties in the court below were the Commonwealth of Kentucky, Barbara Newsome, Gloria Faye Newsome and John Henry Newsome

OPINIONS BELOW

The Trial Court rendered no written opinion in this case. The Opinion of the Kentucky Court of Appeals, initially reversing the convictions of the respondents, was rendered on May 11, 1979 and was to have been published. However, because of the subsequent action taken by the Kentucky Supreme Court that opinion will not now be published but appears in the Appendix to this petition beginning at page B-24 The Opinion of the Kentucky Supreme Court affirming the Ken-

tucky Court of Appeals' reversal of respondents' conviction was rendered on November 3, 1980 and is not to be published or reported. It is printed in the Appendix to this petition beginning at page A-19. The Mandate of the Kentucky Supreme Court has issued in this case but its execution has been stayed pursuant to the petitioner's Motion to Stay Execution and Enforcement of Mandate pending review by this Honorable Court of the Petition for Writ of Certiorari.

JURISDICTION

The Judgment of the Kentucky Supreme Court was entered on November 3, 1980. No rehearing has been requested. Petitioner's Motion to stay execution and enforcement of the state mandate was granted for a period up to and including February 19, 1981. The jurisdiction of this Court is invoked pursuant to 28 USC Section 1257(3).

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

KRS 208.170(2)

The hearing held to consider the transfer of a juvenile to the circuit court shall determine if there is probable cause to believe that an offense was committed and that the child committed the offense.

KRS 208.170(3)

If the court determines that probable cause exists, it shall then determine if it is in the best interest of the child and the community to order such a transfer based upon the seriousness of the alleged offense; whether the offense was against person or property, with greater weight being given to offenses against persons; the maturity of the child as determined by his environment; the child's prior record; and the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services and facilities currently available to the juvenile justice system.

STATEMENT OF THE CASE AND THE FACTS

Gerald McBrayer, his wife and four children lived in a first floor apartment in the Gobel Roberts Addition Housing Complex located at Highland Heights in Prestonsburg, Kentucky. John Henry Newsome and his three daughters, Gloria Faye, age 14, Barbara, age 15, and Charlotte, age 10, lived in the apartment directly above the McBrayer family. Access to the Newsome's second story apartment was by an outside stairway located near the McBrayer's front door. On Sunday afternoon, August 22, 1976, one of McBrayer's

stepchildren, Jan Moore, age 12, was sitting with a friend on the steps leading up to the Newsome's apartment.

Apparently, John Henry did not like to have people, especially children, sitting on the stairway and "blocking" it. (Transcript of Evidence, hereinafter TE, 513). John Henry Newsome allegedly told Jan that she should not be blocking the stairway on that afternoon. He then went upstairs to his apartment where he told his daughters that if there was any more trouble with the McBrayers to make sure that the people downstairs (McBrayers) would not be able to set one foot back in their home. (TE, 473). After he told Gloria to get the kids off the step (TE, 475), she proceeded out of the apartment and down the stairway where she came upon Jan Moore, who was still sitting on the steps. Gloria, grabbing Jan by her hair dragged her off the steps and threw her against the building and told her to stay off the steps. (TE, 417). Jan ran inside and told her stepfather who, although irritated and upset about the matter, did nothing about it at that time. (TE, 418). When Jan then called her mother, who was at work, and complained to her, Mrs. McBrayer called one of the officials at the housing complex to register a complaint. (TE, 380).

In the late afternoon of the following day, sometime after 6 P.M., McBrayer and his wife arrived at their apartment from work. Mrs. McBrayer went about her business of preparing dinner and doing housework while Mr. McBrayer visited with some friends at the housing complex. Later that evening,

a neighbor at the project, Marcella Mullins, was standing out by her automobile listening to her CB radio with Sam Goodman, the project manager, and Goodman's wife. (TE, 230, 448). The three of them had been listening to a CB radio for a half hour or so when they were approached by Mr. McBrayer, who engaged them in casual conversation and mentioned the incident of the preceding day involving McBrayer's stepdaughter and Gloria Newsome. (TE, 231-232). Shortly thereafter, John Newsome drove up in his automobile and parked at the other end of the parking lot from where McBrayer and his friends were standing. McBrayer told Mr. Goodman that "maybe you ought to go in the apartment," and then proceeded toward Newsome's car. (TE, 233, 450). Goodman immediately sent his wife to call the police.

Meanwhile, just before McBrayer arrived at Newsome's car, Barbara Newsome approached her father's car from the passenger side and advised him that McBrayer was coming. She had with her a school book in which were concealed a hunting knife and a steak knife. (TE, 595, 614). McBrayer reached the car shortly thereafter and, from a distance, Mrs. Mullins saw McBrayer initiating a conversation with John Henry, although she could not hear what was being said. (TE, 451). Suddenly, Goodman saw McBrayer jump back and away from John Henry's car with his hands up. (TE, 233). Mr. Goodman then left Mrs. Mullins to call the police. Mrs. Mullins saw McBrayer apparently defending himself from John Henry, who was swinging what appeared to be a belt, which was making a

clanging noise, at McBrayer. (TE, 453). She saw McBrayer stumble and noticed that he had no weapon.

During this encounter, Gloria and Barbara Newsome were standing at the bottom of the stairway yelling "Kill him daddy, kill him, kill the m----- f----- daddy." (TE, 454). Suddenly, the two girls turned and ran directly into McBrayer's apartment. (TE, 455). McBrayer, apparently seeing them enter his apartment, pushed John Henry away and ran into the apartment after the two girls. Moments later Mrs. Mullins saw McBrayer emerge from the apartment with the two girls, who were armed with knives, grasping each girl by the arms which held the knives. (TE, 455). However, by this time John Henry was standing outside near the apartment door and when McBrayer came out with Barbara and Gloria in tow John Henry knocked McBrayer down. The two girls immediately jumped upon McBrayer stabbing him repeatedly with their knives while their father beat McBrayer in the face with the belt, having a heavy metal buckle, which he had wrapped around his fist. (TE, 457). Mrs. Mullins saw John Henry help one of the girls push her knife into McBrayer's body. (TE, 457).

While this struggle was ensuing, Mrs. McBrayer had been taking a bath in her apartment.[1] However, when she emerged from the bathroom she noticed that the front door to the apartment was open and as she

[1]Apparently, this is why she did not happen to confront either Barbara or Gloria Newsome and her husband when the three of them had just been in her apartment.

approached the door she looked outside and saw all three Newsomes stabbing her husband, who was lying prostrate on his back. (TE, 380-381, 388). After a paralyzing instant, she turned and ran to the telephone to call the police. But Barbara Newsome had seen Mrs. McBrayer standing at the door and she rushed inside the apartment and stabbed Mrs. McBrayer twice on the arm and shoulder, the wounds subsequently requiring 25 stitches. (TE, 382, 409).

As Barbara ran back outside to rejoin her sister and father, Sam Goodman had just returned from his apartment where he had been calling the police and he yelled at the Newsomes to get off McBrayer. (TE, 276). But the two girls moved in Goodman's direction and yelled at him, "If you want some of the same, come right on up here." (TE, 291). At approximately this same time the police arrived and ordered the girls to throw down their knives. However, they had to order the girls to do so several times before they finally did in fact relinquish their knives. (TE, 284, 300).

Gerald McBrayer was dead at the scene of the crime. He had sustained 16 stab wounds in his chest and back and severe bruises on his forehead where an impression was left on his skin from what appeared to be the belt buckle from John Henry's belt. (TE, 319-320). He also had a cut on his face. In addition to the two knives relinquished by Barbara and Gloria Newsome, a third knife was found in a book which was lying on the car in which John Henry had pulled up in that evening.

At the juvenile transfer hearing the respondents sought to testify in their own behalf during the "prob-

able cause" phase of the hearing. The juvenile judge refused to permit them to do so apparently because he mistakenly thought that this would be a *per se* violation of *Breed* v. *Jones,* 421 U. S. 519 (1975). See App. C-49 (This is how the Due Process issue arose.) He subsequently found that there was probable cause to believe that the respondents had committed the offense charged, and that it was in the best interests of the community and the respondents to transfer jurisdiction over them to the circuit court to be tried as adults. See App. D-53

After jurisdiction over the two girls was transferred from the juvenile to the circuit court, the Floyd County Grand Jury subsequently returned an indictment on September 9, 1976 against John Henry Newsome and his daughters, Gloria and Barbara Newsome, charging them with the offense of murder as proscribed by KRS 507.020(1)(a). (Transcript of Record, hereinafter TR, 2). At a jury trial held in the Floyd Circuit Court all three Newsomes plead not guilty and testified in their own behalf. However, at the conclusion of a four day trial the jury returned verdicts finding John Henry, Barbara and Gloria Newsome guilty of first degree manslaughter. (TE, 783-784). The punishment for each of the Newsomes was set at 15 years imprisonment. See App. E-59 Judgment was entered accordingly and the Newsomes pursued an appeal to the Kentucky Court of Appeals which reversed Gloria and Barbara's convictions but affirmed John Henry's conviction. *Newsome* v. *Commonwealth,* Ky. App., —— S. W. 2d —— (rendered May 11, 1979). The

Commonwealth subsequently filed petitions for rehearing as to the reversed convictions, but they were denied on August 3, 1979. The Commonwealth's Motion for Discretionary Review was granted by the Kentucky Supreme Court on February 8, 1980. That Court affirmed the reversals of the two girls and reversed their father's conviction also.

REASONS FOR GRANTING THE WRIT

The Kentucky Supreme Court, citing this Court's decisions in *In Re Gault,* 387 U. S. 1 (1967) and *McKiever* v. *Pennsylvania,* 403 U. S. 528 (1971), affirmed the decision of the Kentucky Court of Appeals which found that the respondents' Due Process rights as protected by the Fourteenth Amendment to the United States Constitution were violated when they were not allowed to present evidence or testify in their own behalf at the probable cause phase of a Kentucky juvenile transfer hearing. The petitioner respectfully requests this Honorable Court to grant certiorari in this matter of first impression in order to resolve an important and significant federal constitutional issue which has far-reaching consequences to the juvenile justice system not only in Kentucky but throughout the United States.

Under Kentucky law a juvenile transfer hearing[2] is divided into two distinct and separate phases. KRS

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[2]Although the juvenile transfer hearing statute KRS 208.170 has been amended during the course of this litigation, the amendment does not affect the issue presented to this Court.

208.170(3). See App. F-62 The first phase requires a determination that there is probable cause to believe that the juvenile in question has committed a felony offense. Generally speaking, in Kentucky the only evidence permitted to be presented as a matter of right at the probable cause phase has been that of the Commonwealth in order to establish probable cause. The juvenile has not in the past been given the right as a matter of law to present witnesses or to testify in her own behalf at this *probable cause phase.* This is not true of the best interest phase.

It is only when probable cause has been found by the juvenile judge at the conclusion of the first phase of the transfer hearing that the second phase, or best interest phase, of the juvenile transfer hearing can commence. During this second phase of the transfer hearing the juvenile is permitted to present evidence in her own behalf, including her own testimony, as to any issue pertaining to the "best interest" concept. *Kent* v. *United States,* 383 U. S. 541 (1966).

It is the position of the petitioner that the Kentucky Supreme Court and the Kentucky Court of Appeals have misconstrued and misapplied *McKiever* v. *Pennsylvania, supra,* and *In Re Gault, supra,* to the probable cause phase of a juvenile transfer hearing in Kentucky. The holding of the Kentucky Supreme Court has totally misconceived the law respecting a juvenile's due process right, if any, to present evidence in her own behalf at the probable cause phase of the juvenile transfer hearing. The rejection of the proffer of such evidence by the juvenile at the probable cause phase

does not violate fundamental fairness or Due Process of Law as guaranteed under the Fourteenth Amendment.

The petitioner would of course acknowledge that the Due Process Clause of the Fourteenth Amendment applies to juvenile transfer hearings in Kentucky. *Kent* v. *United States, supra.* However, the question which must be asked is: How much process is due and at what phase of the proceedings? In *Kent* this Court said:

> *"We do not mean by this to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing;* but we do hold that the hearing must measure up to the essentials of due process and fair treatment." (Emphasis ours). 383 U. S., at 562.

This Court has also held that where procedural Due Process must be afforded because of protected liberty interests under the Fourteenth Amendment, there must be a determination as to what process is due under the particular context in question. *Smith* v. *Organization of Foster Families For Equality and Reform,* 431 U. S. 816 (1977); *Morrissey* v. *Brewer,* 408 U. S. 471 (1972). The identification of the scope and the precise dictates of Due Process requires consideration of both the governmental function involved and the private interest effected by that official action. *Fusari* v. *Steinberg,* 419 U. S. 379 (1975).

In essence, the Due Process standard is a flexible one *which mandates only such procedural safeguards as the particular situation demands.* The petitioner respectfully submits that the Kentucky Supreme Court has misconceived the extent to which the Due Process Clause mandates protections for the juvenile during a transfer hearing. It is our position that the "context" of the governmental action in this case (a juvenile transfer hearing) is not of such a nature as would require the added protection of the juvenile having the right to testify and present evidence at the probable cause phase of that hearing.

The very nature of the hearing in question is one which is concerned solely *in its first phase* with determining whether probable cause exists to believe that the juvenile may have committed an offense. KRS 208.170(2). If it does, the court must proceed to the second phase of the transfer hearing to determine if it is in her best interests and that of the Commonwealth, to require jurisdiction to be transferred to an adult court. KRS 208.170(3).

It is the belief of the petitioner that once probable cause has been established by the Commonwealth's evidence the requirements of the state statute as well as federal procedural Due Process have been satisfied if the juvenile has had the opportunity, as here, to be represented by counsel and to cross-examine the Commonwealth's witnesses during the probable cause phase. Due Process protections at this probable cause phase do not mandate that the juvenile be given the right to testify in her own behalf or present other

witnesses to so testify or present defenses in an attempt to "negate" probable cause. In fact, the Commonwealth questions whether it is theoretically possible, much less proper, during this probable cause phase of the transfer hearing to negate probable cause *once it has been established.*

The Commonwealth has the burden of presenting evidence of such substance as *to establish probable cause.* On the other hand, Due Process affords the juvenile the right to counsel and the right to confront the Commonwealth's evidence and test that evidence to determine *if it rises to the level of establishing probable cause.* If that evidence fails to establish probable cause, the juvenile cannot be waived. Such is the extent of the juvenile's Due Process rights at the probable cause phase of the juvenile transfer hearing. The petitioner submits that once probable cause has in fact been established by the Commonwealth's evidence any evidence the juvenile may have as to her innocence is for the finders of fact on the ultimate issue of innocence or guilt — not for a juvenile judge who is acting solely as the determiner of probable cause at the waiver hearing.

In the state appellate courts the respondents seized upon certain language in *Kent* as standing "for the proposition that a juvenile transfer hearing, 'the material submitted to the judge . . . be subjected . . . to examination, criticism, and *refutation*' 383 U.S., at 563 (Emphasis Added)." Thus, they concluded that they should have been given the opportunity during the probable cause phase of the transfer hearing to *refute*

the testimony of the Commonwealth's witnesses by showing that a Class A felony had not been committed. However, the language quoted from *Kent* had direct reference to the D. C. Juvenile Court Act dealing with access of the parties *to the juvenile records of the child* and such evidence there pertains only to the "best interests", not the "probable cause phase". By analogy, the relevance of such records under Kentucky juvenile law would be to the *second "phase"* of the transfer hearing dealing with the *"best interests"* of the juvenile and the public — not to the probable cause phase. In fact, the record in the instant case indicates that the respondents introduced evidence by stipulation as to character, etc. at the "best interests" phase of the hearing, which presents no issue here.

Furthermore, the lower court has either under estimated or failed to anticipate the overwhelming burden that will be placed upon the juvenile court system if the juvenile is given the right to so testify and present such evidence. We submit that a "mini-trial" type situation will arise in nearly every juvenile waiver case which will be very time-consuming since there appears to be no limitation on discovery procedures or defenses or other evidence which may be brought forth by the juvenile. Moreover, it will raise the specter and significantly increase the possibility of double jeopardy problems under *Breed* v. *Jones,* 421 U. S. 519 (1975) should the juvenile judge during the course of the probable cause phase of the hearing for some reason cease to act as determiner of probable cause and by

mistake, inattention or confusion begin to act as trier of fact and determiner of guilt or innocence.[3]

Although Due Process applies to the probable cause phase of the transfer hearing, the lower court has misconceived the "nature" of this phase of the hearing and has incorrectly held that Due Process guarantees the juvenile the right to present evidence at that phase of the hearing.

The most damning effect of the Kentucky appellate courts decisions is that they create a fully adversarial process at the juvenile transfer hearing erasing the idealistic intent of an intimate, informal and protective proceeding which has traditionally been contemplated by courts and legislators when dealing with juveniles. Moreover, as pointed out by Judge Stephenson of the Kentucky Supreme Court in his dissent to this case, the cases of *In Re Gault, supra,* and *McKiever* v. *Pennsylvania, supra,* which were relied upon by the Kentucky Supreme Court did not involve an adversarial proceeding in a juvenile transfer hearing.

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[3]Petitioner acknowledges that as long as the juvenile judge conducts the hearing *solely* as determiner of probable cause, there is no double jeopardy problem. However, the *possibility* of a double jeopardy problem is extremely great, given these circumstances as now proposed by the lower court's Opinion.

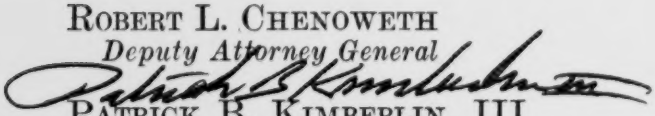
CONCLUSION

For the foregoing reasons the petitioner respectfully submits that this Honorable Court should grant the petition for writ of certiorari in this case in order to rectify the misinterpretation and misapplication of *McKeiver* v. *Pennsylvania, supra,* and *In Re Gault, supra,* to the case at bar. Furthermore, this Court should hold that Due Process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution does not require that a juvenile be permitted to testify in her own behalf or otherwise present evidence at the probable cause phase of a Kentucky juvenile transfer hearing.

Respectfully submitted,

STEVEN L. BESHEAR
Attorney General

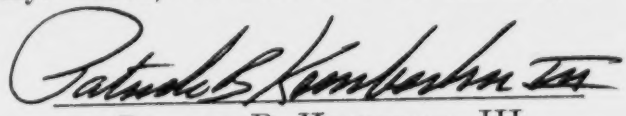
ROBERT L. CHENOWETH
Deputy Attorney General



PATRICK B. KIMBERLIN, III
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Counsel for Petitioner

PROOF OF SERVICE

I, Patrick B. Kimberlin, III, one of counsel for the petitioner, hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid, this 12 day of December, 1980, to Hon. Erwin Lewis, Assistant Public Advocate, State Office Building Annex, Third Floor, Frankfort, Ky. 40601, Counsel for Barbara Newsome, and Hon. Larry H. Marshall, Assistant Public Advocate, State Office Building Annex, Third Floor, Frankfort, Ky. 40601, Counsel for Gloria Faye Newsome.



PATRICK B. KIMBERLIN, III
Assistant Attorney General

APPENDIX

RENDERED: NOVEMBER 3, 1980
NOT TO BE PUBLISHED

APPENDIX A

SUPREME COURT OF KENTUCKY

79-SC-422-DG

COMMONWEALTH OF KENTUCKY - - - *Movant*

v.

BARBARA NEWSOME AND
GLORIA FAYE NEWSOME - - - - *Respondents*

On Review from the Court of Appeals
CA-1900-MR
(Floyd Circuit Court No. 4306)

MEMORANDUM OPINION OF THE COURT— AFFIRMING

The respondents, Barbara and Gloria Faye Newsome, were charged with the murder of Gerald McBrayer. The girl's father was also connected with the crime. At the time of the incident, Barbara and Gloria were 15 and 14 years of age, respectively. A transfer hearing was held, pursuant to KRS 208.170 in the Juvenile Division of the Floyd District Court and an order was entered transferring jurisdiction over the respondents to the Floyd Circuit Court. The girls were tried and convicted of first-degree manslaughter and sentenced to 15 years' imprisonment.

On appeal, the Court of Appeals reversed Barbara's conviction outright since she had attained the age of 18 and reversed Gloria's conviction and remanded the case

to the juvenile court for a new transfer hearing. The court held the transfer order invalid because of the juvenile court's failure to allow the girls to present evidence or to testify on their own behalf at the probable cause phase of the transfer hearing. As the court stated: "Due process in juvenile proceedings simply means 'fundamental fairness.'" See McKeiver v. Pennsylvania, 403 U. S. 528; 91 S. Ct. 1976; 29 L. Ed. 2d 647 (1971); see also In re Gault, 387 U. S. 1; 87 S. Ct. 1428; 18 L. Ed. 527 (1967). A hearing in which the accused is deprived of the right to speak in his or her own behalf cannot be adjudged "fair." Nor can it be said that the juvenile court, in issuing the order, was acting "in the best interest of the child," as prescribed by KRS 208.170(3), when it lacked what could constitute highly pertinent information about the crime and the accused.

The judgment of the Court of Appeals is affirmed.

Palmore, C. J., and Aker, Clayton, Lukowsky, Stephenson, and Sternberg, JJ., sitting. All concur except Stephenson, J., who dissents.

Attorneys for Movant:

ROBERT F. STEPHENS
Attorney General
PATRICK B. KIMBERLIN, III
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

Attorneys for Respondents:

JACK EMORY FARLEY, Public Advocate
ERWIN LEWIS, Assistant Public Advocate
(Counsel for Barbara Newsome)
LARRY H. MARSHALL
Assistant Public Advocate
(Counsel for Gloria Faye Newsome)
State Office Building Annex
Frankfort, Kentucky 40601

DISSENTING OPINION BY JUSTICE STEPHENSON

The majority opinion accomplishes the result of turning a juvenile transfer hearing into an adversary proceeding. This contradicts the whole idea of even an adjudicatory proceeding in juvenile court.

The authorities relied upon in the majority opinion do not support the result reached by the opinion.

McKeiver simply held that a juvenile was not entitled to a jury trial in an adjudicatary hearing. Then *McKeiver* cited *In re Gault* for the "fundamental fairness" and "due process" requirements. *In re Gault* enlarged upon Kent v. U. S., 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966). In *Kent* the court held that before the juvenile court could waive jurisdiction and transfer to the trial court for trial as an adult, the juvenile was entitled to a hearing measuring up to the essentials of due process and fair treatment, the juvenile's lawyer having access to the record relied upon by the juvenile court, and also that reasons for the transfer must be stated so that a meaningful appellate review could be had.

In citing the proposition laid down in *In re Gault*, *McKeiver* stated at page 533:

> "Some of the constitutional requirements attendant upon the state criminal trial have equal application to that part of the state juvenile proceeding that is adjudicative in nature. Among these are the rights to appropriate notice, to counsel, to confrontation and to cross-examination, and the privilege against self-incrimination. Included, also, is the standard of proof beyond a reasonable doubt."

McKeiver further said at page 533, 534:

> "The Court, however, has not yet said that *all* rights constitutionally assured to an adult accused of crime

> also are to be enforced or made available to the juvenile . . . .
>
> "'We do not mean by this to indicate that the hearing to be held must conform with all the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.' *Kent,* 383 U. S., at 562; *Gault,* 387 U. S., at 30."

Then *McKeiver* stated the philosophical reasoning behind this ruling at page 545:

> "There is a possibility, at least, that the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal, protective proceeding."

So much for "due process" and "fundamental fairness" statements in the majority opinion. Both phrases were used in the context of those rights enunciated in *In re Gault* and *McKeiver.* In neither instance was an adversary proceeding contemplated in a transfer hearing in juvenile court.

Breed v. Jones, 421 U. S. 519, 95 S. Ct. 1179, 44 L. Ed. 2d 346 (1975), 537, 538, cited *Kent* for the due process requirements of a transfer hearing, but went on to say, "However the Court has never attempted to prescribe criteria for, or the nature and quantum of evidence that must support, a decision to transfer a juvenile for trial in adult court." With respect to the double jeojardy holding the opinion again cited the philosophy of juvenile proceedings at page 540, "(w)e regard a procedure which results in such a dilema as at odds with the goal that, to the extent fundamental fairness permits, adjudicatory hearings be informal and nonadversary," citing *McKeiver* and *In re Gault.*

With this background, I disagree with holding of the majority that would convert a transfer hearing into an adversary proceeding.

For the reasons stated I dissent.

MANDATE

The Court being sufficiently advised delivered herein a memorandum opinion November 3, 1980.

It is therefore considered that the decision of the Court of Appeals is affirmed; which is ordered to be certified to said court.

Issued November 25, 1980

John C. Scott, Clerk
(s) By Rose Tomlinson, D.C.

ORDER GRANTING STAY OF EXECUTION AND ENFORCEMENT OF MANDATE

On application of the movant, the motion to stay the execution and enforcement of the mandate pending application for Writ of Certiorari to the United States Supreme Court is granted to and including February 19, 1981.

Any additional requests for stays deemed necessary should be addressed to the Supreme Court of the United States.

The Clerk of the Supreme Court of Kentucky is hereby directed to retain the record until the U. S. Supreme Court rules on movant's Petition for Writ of Certiorari.

Stephens, Stephenson, Sternberg and Clayton, J.J., sitting. All concur.

ENTERED November 21, 1980.

(s) John S. Palmore
Chief Justice

APPENDIX B

OPINION RENDERED: MAY 11, 1979
TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. CA-1900-MR

BARBARA NEWSOME and
GLORIA FAYE NEWSOME - - - - - - *Appellants*

Appeal from Floyd Circuit Court
v. *Honorable Hollie Conley, Judge*
No. 4306

COMMONWEALTH OF KENTUCKY - - - - - - *Appellee*

AND

No. CA-1904-MR

JOHN HENRY NEWSOME - - - - - - *Appellant*

Appeal from Floyd Circuit Court
v. *Honorable Hollie Conley, Judge*
No. 4306

COMMONWEALTH OF KENTUCKY - - - - - - *Appellee*

REVERSING AND REMANDING AS TO GLORIA FAYE NEWSOME

REVERSING AS TO BARBARA NEWSOME AFFIRMING AS TO JOHN HENRY NEWSOME

BEFORE: MARTIN, CHIEF JUDGE, REYNOLDS and WILHOIT, JUDGES.

MARTIN, CHIEF JUDGE. John Henry Newsome, Barbara Newsome, and Gloria Faye Newsome appeal from a judg-

ment convicting them of first degree manslaughter and sentencing them each to fifteen years imprisonment. The judgment was entered pursuant to a jury verdict in the Floyd Circuit Court.

The three Newsomes were indicted for the murder of Gerald McBrayer. The crime occurred on or about August 23, 1976, and the indictment was handed down on September 9, 1976.

At the time of the indictment for this Class A felony, Barbara Newsome was fifteen years of age, and her sister Gloria Faye was fourteen.

The indictment of the two juveniles followed a transfer hearing held pursuant to KRS 208.170 in the Floyd County District Court, Juvenile Division. An order was entered transferring jurisdiction over both girls to the Floyd Circuit Court.

The primary issue raised by appellants Barbara and Gloria Faye relate to the juvenile court order of transfer of jurisdiction. The issues raised by John Henry Newsome will be discussed later in this opinion.

FACTS

The initial task presented in this appeal is to reconstruct the events of August 23, 1976. In view of the long trial and the many pages of the transcript taken at the trial, this is not a simple endeavor. Furthermore, the fatal attack upon Gerald McBrayer must be understood in the context of the existing hostilities between the Newsome and McBrayer families. Therefore, it is necessary to outline the events preceding the violent episode of August 23.

Appellant John Henry Newsome, disabled and unemployed, lived in a low-income apartment complex in Prestonsburg, Kentucky, with his three daughters. Barbara and Gloria, also appellants, were fifteen and fourteen respec-

tively, at the time of the incident. A younger child, Charlotte, was ten at the time. John Henry Newsome, hereinafter referred to as Newsome, had legal custody of the girls, having been divorced for several years. The family was apparently close-knit and isolated from others. However, ill feeling between the Newsomes and the McBrayers had developed. The McBrayers—Gerald, his wife Geraldine, and her four children—lived downstairs from the Newsomes. A continuing dispute developed over a stairway next to the McBrayer apartment that led to the Newsome residence. Newsome objected to the McBrayer stepchildren and others sitting on the steps and blocking the access to his apartment. Gerald McBrayer had complained to Newsome about noise coming from the Newsome apartment. Furthermore, both men had apparently expressed a willingness to fight. On Sunday evening, August 22, Newsome became upset because Jan Moore, McBrayer's stepdaughter, was sitting on the steps and Newsome told Gloria to tell Jan to move. When Jan did not, Gloria pulled her off the stairs.

The antagonism between the two families erupted tragically and violently the following evening. Newsome left the apartment in his car around 6:00 p.m. to find school books for the girls since school had started that day. The three girls left the apartment to walk to the store for some school supplies. McBrayer met them at the steps and asked if they were going to pull his hair and make him get up, alluding to the encounter between Gloria and Jan the previous evening. McBrayer, who smelled of beer according to the girls' testimony, also told the girls to tell their father that he, McBrayer, wanted to kill him. The three girls walked on to the store. Barbara found a railroad spike on the way home, which she picked up because she believed that McBrayer would attack her. Newsome was not home when they returned to the apartment. Barbara sent Char-

lotte to bed and gathered paper, pencils, and a science book, into which she placed a steak knife, because she was "afraid Mr. McBrayer was going to come up the stairs to attack me." Before going out on the porch, Barbara also got out a hunting knife, which she put on the television. The sisters sat out on the porch and worked on Gloria's school schedule. According to their testimony McBrayer was outside by his car and hurled a barrage of verbal insults and obscenities at the girls. At one point, when Barbara went downstairs to check the mail, McBrayer threatened to kill them all. Barbara walked back upstairs and told Gloria to put a kettle of hot water on in case McBrayer came into their apartment.

Sam and Sharon Goodman and Marcella Mullins were standing by the Mullins' car listening to a CB radio around 9:00 p.m. Sam, the maintenance man in the apartment building, had learned of the stairway incident between Jan and Glorida when McBrayer visited his apartment early Monday evening to complain about the episode. McBrayer approached the three neighbors around 9:30 p.m., and they began talking about the incident. None of these witnesses testified to hearing any threats or insults uttered by McBrayer to the Newsome girls. Shortly after McBrayer joined the group, Newsome drove up. It was at this time, around 10:00 p.m., that the final confrontation occurred.

Barbara Newsome heard her father drive up, put the hunting knife in her science book, and hurried outside to warn Newsome about McBrayer. Gloria, meanwhile, found a butcher knife and came down shortly after Barbara. According to Barbara, McBrayer walked over to Newsome's car and as soon as Newsome got out, struck him and kicked him. McBrayer told Barbara that she was also going to get hurt. Newsome testified that McBrayer struck him three or four times when he got out of the car. The other witnesses offered conflicting versions as to how the fight

began. Sam Goodman testified that when Newsome drove up, McBrayer told Sam that he should go into his apartment because he believed there would be trouble. Sam saw McBrayer walk over to the Newsome car and jump back with his hands up. Sharon Goodman had gone inside at her husband's request in order to call the police. Sam went in to see if she had made the call. When the Goodmans went back outside, all three Newsomes were fighting McBrayer. Newsome was striking McBrayer with the belt. The girls were on top of McBrayer, who had fallen during the fight, and were stabbing him. Marcella Mullins stated that when Newsome drove up, McBrayer walked casually over to the car. Newsome got out and started swinging a belt at McBrayer. Sandra Maynard, who had gone out to lock her car shortly before the trouble started, testified that the men had only squared off and did not begin fighting immediately. Jan Moore, McBrayer's stepdaughter, who was watching from a window, stated that Newsome first kicked McBrayer.

The struggle intensified when the two girls became involved. Marcella Mullins testified that the two girls were screaming, "Kill him Daddy! Kill him Daddy!" at Newsome while the two men were fighting. The girls then ran towards the McBrayer apartment and McBrayer ran after them. Barbara said she was going to ask Mrs. McBrayer to stop the fight because of Newsome's disabled condition. McBrayer pulled the girls, who were carrying knives, out of the apartment and threw them to the ground. Newsome confronted McBrayer outside the apartment and knocked him over. Newsome beat McBrayer with the belt while the two girls stabbed him. Gloria said she did not remember stabbing McBrayer, but struck at his face with the butcher knife after he threw her to the ground. Barbara testified that she first stabbed McBrayer in the back with the hunting knife in order to protect Gloria. At this point

Barbara admitted that Newsome started hitting McBrayer with the belt and that she stabbed him again and again. Newsome testified that he did not see his daughters stab McBrayer or see any knives. He testified that he began hitting McBrayer with his belt because he had thrown the girls to the ground.

McBrayer's wife Geraldine had been taking a bath during the initiation of the struggle. She went to close the front door and to her horror, observed McBrayer on his back with all three Newsomes hitting and stabbing him. When Mrs. McBrayer ran to telephone the police, Gloria darted into the apartment and cut her on her left arm and shoulder. The wound required 25 stitches.[1] After Gloria ran back out, Mrs. McBrayer went back to the door and heard the girls scream, "Kill him Daddy." Sam Goodman had returned outside by this time and yelled at the girls to get away from McBrayer. Barbara ran at Sam with her knife and told him if he didn't want "more of the same, get back up the street."

Officer Keith Lawson received a call around 10:00 p.m. and arrived on the scene shortly afterwards. When he arrived, the three Newsomes were standing near the body and the girls were hollering at Sam to get away. Officer Lawson approached the girls and asked them to drop the knives. Lawson placed the family in the patrol car. McBrayer was dead at the scene. He had sustained 16 stab wounds in his chest and back and severe bruises on his forehead. A laboratory report disclosed a blood-alcohol content of .22%. A third knife was found in a book which was lying on the Newsome car. The hunting knife used by Barbara and the metal buckle from Newsome's belt con-

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[1]Mrs. McBrayer testified that Barbara came at her with a knife. Gloria testified, however, that she, not Barbara, had cut Mrs. McBrayer.

tained the presence of human blood. The butcher knife had only the possible presence of blood. On the basis of these facts and other evidence produced at trial, each appellant was convicted of first degree manslaughter and sentenced to 15 years imprisonment.

BARBARA AND GLORIA FAYE NEWSOME

I.

Our concern as it relates to the two juvenile appellants does not go to the circuit court trial, but rather to the transfer hearing held in the juvenile court where jurisdiction over the juveniles was transferred to the circuit court for trial as adults.

At the close of the Commonwealth's case for the establishment of probable cause under KRS 208.170, the juvenile judge refused to permit any evidence on behalf of the juvenile appellants. The judge was apparently concerned with the then recent United States Supreme Court case of *Breed* v. *Jones,* 421 U. S. 519, 95 S. Ct. 1779, 44 L. Ed. 2d 346 (1975), in which the Court ruled that where an adjudicatory hearing had been held in juvenile court, a subsequent trial in adult court was prohibited under the principles of double jeopardy.

At this hearing appellants were not permitted either to take the stand in their own behalf, present evidence by avowal through counsel, or to call witnesses in their own behalf.[2]

The first question we must determine is whether the question of error in the transfer proceeding is properly before us.

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[2]This refusal did not extend specifically to the "best interest" phase of the hearing. There, appellants were permitted to present by stipulation avowal evidence of three witnesses.

While it is clear that an appeal from a transfer order may be taken immediately to the circuit court, such appeal is not the only permissible route. (*See Sharp* v. *Commonwealth,* Ky., 559 S. W. 2d 727 (1977); *Schooley* v. *Commonwealth,* Ky., 556 S. W. 2d 912 (1977); *Bingham* v. *Commonwealth,* Ky., 550 S. W. 2d 535 (1977); *Holt* v. *Commonwealth,* Ky., 525 S. W. 2d 660 (1975); and *Hubbs* v. *Commonwealth,* Ky., 511 S. W. 2d 664 (1974).

No such appeal was made in this case, although a motion to quash the indictment and a motion to return the juveniles to juvenile court was presented, alleging an invalid transfer. These motions were overruled by the circuit court. No other attack was then made.

The uncertainty as to the proper procedure appears to be a result of case law and the ambiguity of the right to appeal to circuit court prescribed for juveniles under KRS 208.380. This statute does not specifically refer to appeals from orders of transfer rendered pursuant to KRS 208.170. However, the desirability of an appeal prior to the juvenile being stripped of his juvenile status and cast irrevocably into the adult system is self-evident. See Stamm, *Transfer of Jurisdiction in Juvenile Court,* 62 K.L.J. 124 (1974).

In the past, several methods of attack on invalid transfers from juvenile court have been permitted. *Hamilton* v. *Commonwealth,* Ky., 534 S. W. 2d 802 (1976). Where the attack was not raised at trial, it has been considered on direct appeal. *Hubbs* v. *Commonwealth, supra; Anderson* v. *Commonwealth,* Ky., 465 S. W. 2d 70 (1971). It has been held in a line of cases that because an invalid transfer was fatal to the jurisdiction of the circuit court, failure to raise the issue at trial court was not a bar to direct appeal after conviction. *See Edwards* v. *Commonwealth,* Ky., 94 S. W. 2d 25 (1936).

In the present case, because of our reversal due to the invalid transfer order, we now have the problem of one

appellant who is still a juvenile and subject to further proceedings in juvenile court. This is true even though two and one-half years have passed since the alleged crime and she has been thoroughly tried through a complex adult criminal prosecution. We have a second appellant who is now an adult, and for whom juvenile jurisdiction may no longer be available.[3] This appellant had been irretrievably placed in the adult criminal system before any adequate attack was made on the very order denying her any further treatment in the juvenile system.

As suggested previously, the unpredictable nature of transfer order attacks seems to be either the result of the case law permitting variety, or the ambiguity of KRS 208.380.

The relevant portions of KRS 208.380 are as follows:

> (1) An appeal to the circuit court may be taken as a matter of right from the juvenile session of the district court from all orders and judgments whereby any infant, or other person, shall be restrained of his liberty, or placed in the custody of any institution, or fined or punished in any manner. The appeal shall be taken in the manner provided in the Rules of Criminal Procedure, and the circuit court shall, in the best interest of the child, hear such cases as soon as reasonably possible.
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> . . . .
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> (3) Any party aggrieved by the appellate decision of a circuit court made pursuant to subsection (1) may

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[3]We are cognizant of KRS 208.020(1) which, as recently amended, appears to place jurisdiction in the juvenile court of persons over 18 who committed an offense while a juvenile. Since the impact of this statute is unclear and neither party has addressed the problem, we do not discuss its possible application to this case.

> appeal to the Court of Appeals in the manner provided in the Rules of Criminal Procedure. The Court of Appeals shall, in the best interest of the child, hear such cases as soon as reasonably possible. . . .
>
> (4) Any party aggrieved by a proceeding under KRS 208.020(1)(d) may appeal from the juvenile court to the circuit court as a matter of right in a manner provided in Rule 72, Kentucky Rules of Civil Procedure. . . .

As is evident, this statute does not specifically provide for appeal to the circuit court from a district court order of transfer. Yet, a transfer order is just as final, and is more far-reaching and potentially devastating than an adjudication or disposition proceeding for which appeal to the circuit court is clearly provided.

Until such time as the legislature may clarify the procedure relating to appeals of a transfer order issued pursuant to KRS 208.170, we hold that an appeal to circuit court from an order transferring jurisdiction of a juvenile to the circuit court rendered pursuant to KRS 208.170 is not only permissible, but required in order to preserve the issue for our consideration. *See Schooley* v. *Commonwealth, supra; Holt* v. *Commonwealth, supra.*

As noted in *Schooley,* though it appears that due to a lack of "jurisdiction," the issue could not be waived, and could be raised at any time, where the issue is considered as a matter of due process there can be waiver under certain circumstances due to a failure to appeal. *See Smith* v. *Commonwealth,* Ky., 412 S. W. 2d 256 (1967).

An appeal from an order transferring jurisdiction of a juvenile to circuit court shall be effected according to the procedures outlined in KRS 208.380. In fact, we see no reason why this statute should not be read to fully contemplate appeal from a transfer order. *See Hensley* v. *Munici-*

pal Court, 411 U. S. 345, 93 S. Ct. 1571, 36 L. Ed. 2d 294 (1973). By following this procedure, the gross inequities that often result where appeal of a transfer order is delayed until after adult court conviction may frequently be avoided. *Cf. Graham* v. *Ridge*, 489 P. 2d 24 (Ariz. 1971); *Aye* v. *State*, 299 A. 2d 513 (Md. 1973); and *P. H.* v. *State*, 504 P. 2d 837 (Alaska, 1972).

Furthermore, in view of the power of the circuit court to transfer a juvenile back to juvenile court, even after a grand jury indictment, KRS 208.170(5)(b), we believe that the form and standards and facilitation available through an immediate appeal to circuit court of the original transfer order will be supportive of and consistent with that power.

The appeal to circuit court shall stay all further proceedings in the criminal prosecution until the circuit court has ruled on the appeal. This is consistent with the purpose and intent of KRS 208.380(1), and Rules of Criminal Procedure, 12.04(4).

II.

The juvenile division of the district court recognized its "onerous burden and awesome responsibility" involved in making a determination of transfer to adult court of the two juvenile appellants. Yet, in the present case, at the hearing held pursuant to KRS 208.170, where the court must first find that probable cause existed to believe that a Class A felony had been committed and that the accused juveniles had committed the offense, and then determine, according to the best interest of the children and the community, whether transfer should be ordered, the court refused any and all evidence from the accused juveniles relative to the probable cause issue, and accepted only a stipulation as to what three witnesses would say relevant to the "best interest" issue.

It is important to note that "probable cause" goes not only to the commission of a crime, but, due to the age of the juveniles, specifically to the commission of a Class A felony. KRS 208.170(1). The juveniles were eventually convicted by the jury of first degree manslaughter, a Class B felony. This is at least some indication that testimony and evidence from the accused juveniles would have been helpful at the transfer proceeding.

The juvenile judge, on page 3 of his Opinion and Order of transfer, stated:

> The Court, for purposes of the transfer hearing only, refused to allow the defendants' testimony as to the events immediately before, during, and after the alleged crimes; the basis of this ruling was, that if the court had evidence from the defendants as to what transpired at those times, the evidence would change the character of the hearing; that, in fact, it would take on the character of an adjudicatory proceeding, and the whole purpose of KRS 208.170 would have been defeated.

That court's sincere, but inaccurate, concern that the nature of the hearing would become adjudicatory and double jeopardy would attach was spawned by its interpretation of *Breed* v. *Jones, supra.* The court did not have before it the benefit of *Sharp* v. *Commonwealth,* Ky., 559 S. W. 2d 727 (1977), wherein it was stated at page 728:

> The juvenile court hearing mandated by KRS 208.170 confined itself from beginning to end to a determination of whether the case should be transferred to circuit court. "The hearing held to consider the transfer of a juvenile to the circuit court shall determine if there is probable cause to believe that the offense was committed and that the child committed

> the offense." KRS 208.170(2). *This was not a proceeding that could possibly have resulted in adjudication of guilt or punishment.* It is harmonious with, rather than in contravention of, the requirements of *Breed* v. *Jones.* (Emphasis added.)

The hearing prescribed for purposes of determining whether a child should be transferred to the adult criminal system has been called the most critical stage of the juvenile justice process. *See Kent* v. *United States,* 383 U. S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966); *Smith* v. *Commonwealth,* Ky., 412 S. W. 2d 256 (1967); and discussions in Stamm, *supra;* and Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited,* 43 Ind. L. J. 583 (1968).

In Schornhorst, *supra,* the author stated that the social and legal consequences commensurate with this transfer made the decision to do so, "in essence, a sentence of 'death' as a juvenile, with the subsequent proceedings in the criminal court completing the execution."

That the constitutional element of due process attaches to this transfer hearing is beyond question. *Kent* v. *United States, supra; In Re Gault,* 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); *Schooley* v. *Commonwealth, supra; Hubbs* v. *Commonwealth, supra.*

Due process in juvenile proceedings simply means "fundamental fairness." *McKeiver* v. *Pennsylvania,* 403 U. S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971); *Haley* v. *State of Ohio,* 332 U. S. 596, 68 S. Ct. 302, 92 L. Ed. 224 (1948).

Under Kentucky law it is clear that to support an order of transfer of a juvenile to adult court,

> . . . either the waiver order, an accompanying statement, or the juvenile court record must include 1) a showing that the juvenile had a hearing at which he was represented by counsel and 2) a statement of the

> reasons for the transfer which are specific enough to permit meaningful review for the purpose of determining whether there has been compliance with KRS 208.170(1). *Hubbs* v. *Commonwealth, supra* at 666.

See also *Bingham* v. *Commonwealth, supra; Baker* v. *Commonwealth,* Ky., 500 S. W. 2d 69 (1973); *Risner* v. *Commonwealth,* Ky., 508 S. W. 2d 775 (1974); *Whitaker* v. *Commonwealth,* Ky., 479 S. W. 2d 592 (1972).

In order to apply the concept of "meaningful review" we should note the proceedings prescribed by KRS 208.170:

> (1) If, prior to an adjudicatory hearing in the juvenile court, it appears to the court that there is reasonable cause to believe that a child before the court has committed a felony, and at the time of commission of the offense, the child was sixteen (16) years of age or older, or was less than sixteen (16) years of age but the offense was a Class A felony or a capital offense, and the court is of the opinion that the child be tried and disposed of under the regular law governing crimes, the court shall conduct a separate hearing to determine if the case should be transferred to the circuit court of the county in which the offense was committed. No child shall be considered a felon for any purpose until transferred to, tried and convicted of a felony by a circuit court.
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> (2) The hearing held to consider the transfer of a juvenile to the circuit court shall determine if there is probable cause to believe that an offense was committed and that the child committed the offense.
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> (3) If the court determines that probable cause exists, it shall then determine if it is in the best interest of the child and the community to order such a transfer based upon the seriousness of the alleged

offense; whether the offense was against person or property, with greater weight being given to offenses against persons; the maturity of the child as determined by his environment; the child's prior record; and the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services, and facilities currently available to the juvenile justice system.

(4) If, following completion of the transfer hearing, the court is of the opinion that the best interest of the child and of the public would be protected by such transfer, the order of transfer shall state the reason for such transfer.

Considering the factors relevant to a transfer as listed in paragraph 3, we then note certain findings actually entered by the juvenile court:

3. Both defendants herein are under the age of 16 years;

4. Both defendants are charged with crimes which are Class A felonies or capital offenses;

. . . .

6. At said transfer hearing, the Commonwealth established that there was probable cause to believe that each defendant committed the offense of murder;

7. That, based upon the following reasons, it is in the best interests of both children and the community that the cases against both be transferred to the Floyd Circuit Court:

a. The offense alleged to have been committed by each child is grave, there being none more serious in the opinion of this Court, than the taking of a human life;

b. Each child appears to be of sufficient emotional maturity to be tried as an adult;

c. The public has ar interest in being adequately protected from the likelihood of the re-occurrence of the same or of the occurrence of a similar crime to that which the defendants have allegedly committed; based upon the evidence hereinabove summarized, and the entire transcript thereof, the Court finds that it is unlikely that the prospects for such protection can be offered the public with the procedures, services, and facilities currently available to the juvenile justice system; the Court does find that the Division could provide some reasonable rehabilitative services to the defendants, if tried and convicted in this Court; however, the quality of the services would be diluted by virtue of the lack of facilities to keep the defendants confined while the Division is attempting to render the same. This fact also demonstrates that the pubilc cannot be adequately protected as hereinabove set out;

d. Even though neither of the defendants has a prior juvenile record, this fact is outweighed by the other factors hereinabove considered.

In determining the offense to be charged, which for transfer to be valid must have been a Class A felony, and in considering the statutory factors as noted above, it is inconceivable that not only the question of "what" the child did, but "why" she did it, would not be essential. We know of no other instance where due process is an element of a hearing that only one side of the evidence may be presented, and that the very individual whose rights, welfare, and interests are at stake finds herself muzzled and silenced, and forced to sit mute while evidence and orders are meted out.

A review of a transfer order based upon such a half-hearing can hardly be "meaningful." It is an indispensable

element, in our adversary system, to be allowed to testify in one's own behalf. That is, "a faundamental [requirement of due process] is *the opportunity to be heard.*" *Grannis* v. *Ordean,* 234 U. S. 385, 394, 34 S. Ct. 779, 58 L. Ed. 1363 (1914). (Emphasis added).

Furthermore, the right to counsel at the transfer hearing is little more than a polished formality without the ability of counsel to call witnesses and present evidence on behalf of his juvenile clients. A transfer order is the first step in the criminal prosecution. The Commonwealth sees to it that the strongest possible case is made to obtain a transfer. Counsel for the juvenile must then use all permissible means to present every defense the law allows in an attempt to secure for the child the benefits of the juvenile system. *In Re Gault, supra; Haziel* v. *United States,* 404 F. 2d 1275 (D.C. Cir. 1968); and *see* Comment, 12 St. Louis U.L.J. 424 (1968).

To strike dumb his juvenile client and shut out his witnesses is to render such advantage to the prosecution and injustice to the juvenile that due process is clearly abused. *Cf. Rudolph* v. *State,* 238 So. 2d 542 (Ala. 1970); *Aye* v. *State, supra; People* v. *McFarland,* 95 Cal. Rptr. 369, 17 Cal. App. 3d 807 (1971); and *In Re Brown,* 183 N. W. 2d 731 (Iowa, 1971).

The Commonwealth requests us to hold that, as a matter of state and federal due process of law, a juvenile has no right to testify at a juvenile transfer hearing. "To hold otherwise," states the Commonwealth, "would be to create a 'mini-trial' at the juvenile transfer hearing with the attendant ever present danger of jeopardy attaching."

We believe the concern for danger is misplaced. The danger of double jeopardy attaching at a transfer hearing, which is deciding only a jurisdictional question, because the accused child is allowed to testify is nonexistent. *Sharp* v. *Commonwealth, supra.* Whereas the danger to the juvenile

structure in our society, and specifically to the juveniles within that structure, is acute if, at juvenile transfer hearings, the accused child is forbidden to speak.

Thus, for a juvenile transfer hearing to be deserving of its name, the accused child must have the right to be heard.

We therefore hold that at a transfer hearing held pursuant to KRS 208.170, the accused child has not only the right to hear the evidence and cross-examine the witnesses, but also the right to present evidence and to be heard. *Cf., D.H.* v. *State,* 251 N. W. 2d 196 (Wis. 1977); *Summers* v. *Indiana,* 230 N. E. 2d 320 (1967); *In Re Brown,* 183 N. W. 2d 731 (Iowa, 1971); *Orcutt* v. *State,* 173 N. W. 2d 66 (Iowa, 1969).

While the issue most precisely before us concerned the "probable cause" portion of the hearing, and our ruling herein relates specifically thereto, we see no reason that such right should not extend to the "best interest" phase of the hearing.

In view of our decision, we do not consider or determine the issues raised by the juvenile appellants relevant to the circuit court trial.

JOHN HENRY NEWSOME

John Henry Newsome was convicted of first degree manslaughter. He argues that his conviction should be reversed because of two errors the court committed in its instructions to the jury.

The court instructed the jury on murder, first degree manslaughter, second degree manslaughter, reckless homicide, first degree assault, and second degree assault. Under each of those instructions the judge included the qualifying language that they could find Newsome guilty if he was not privileged to act in self-protection or protection of another. The court further instructed the jury on

self-defense and defense of others and submitted definitions of intentionally, wantonly, recklessly, serious physical injury, and dangerous instrument.

Newsome submitted the following instruction to the court:

> The defendant believes the jury should be instructed that if they so believe, that the amount or degree of force returned by John Henry Newsome was greater than what he believed to be reasonably necessary, then the jury should be authorized to find that John Henry Newsome acted—in returning that degree of force, was acting either wantonly or recklessly and the jury should be authorized to find him guilty under an instruction—guilty of an offense for which those mental states are required. (T.E., p. 231).

The court rejected this instruction and appellant objected.

Appellant contends that without such an instruction the jury was not able to reach the appropriate verdict if they believed from the evidence that Newsome used more force than was reasonably necessary for his self-protection and for the protection of Barbara and Gloria Faye. A defendant is entitled to acquittal for intentional acts involving the use of deadly physical force where he believes such force is necessary to protect himself or others from death or serious physical injury. KRS 503.050; KRS 503.-070. Where a defendant's belief as to the necessity for the use of force, or of the degree of force used, is so unreasonable as to be wanton or reckless he may still be found not guilty of an intentional crime. However, he may be found guilty of an offense for which the required mental state is wantonness or recklessness, i.e., as in this case, second-degree manslaughter or reckless homicide. KRS 503.120. In other words, the defense of justification would not,

under certain circumstances, completely absolve a defendant from criminal liability but would provide him with a lesser degree of punishment. Newsome argues that the rejected instruction would have made clear to the jury that they could find him guilty of second degree manslaughter, for example, if they believed he acted wantonly in the degree of force used.

We believe the instructions as given fully informed the jury of the possible verdicts. The court instructed on the full range of homicide offenses and defined all the terms including wanton and reckless. By giving the full range of instructions the trial court was adhering to the meaning of KRS 503.120, i.e., while the assertion of defense of self-protection may not require acquittal for the intentional act, it will not preclude conviction for a lesser crime with a nonintentional mental state. The instructions afforded Newsome the complete range of options. acceptance of his defense and acquittal, rejection and conviction of an intentional crime, or conviction of a lesser crime. The instruction offered by Newsome would not have clarified the jury's task and indeed is confusing in itself. The court did not err in refusing to give the instruction.

Newsome's second and final argument is that his conviction should be reversed because the court failed, over his objection, to instruct the jury on assault in the third degree. Third degree assault arises when physical injury is intentionally or wantonly inflicted by one person upon another. Physical injury is defined in KRS 500.080(13) to be substantial physical pain or any impairment of physical condition.

We are not convinced that an instruction on third degree assault was warranted under the facts of this case. An instruction on a lesser included offense should not be given unless the evidence is such that a reasonable person could doubt that the defendant is guilty of the crime

charged but could conclude that he is guilty of the lesser included offense. *Luttrell* v. *Commonwealth,* Ky., 554 S. W. 2d 75 (1977). Defendant here was convicted of first degree manslaughter, thus this is not a case where the conviction was for an offense only one, two, or even three degrees higher than the offense on which the defendant feels the jury should have been instructed.

Therefore, failure of the court to instruct on third degree assault was harmless, if error at all, under the facts of this case.

The judgment and conviction of Gloria Faye Newsome is reversed and remanded to the Floyd County District Court now sitting in juvenile matters for proceedings consistent herewith.

The judgment and conviction of Barbara Newsome is reversed.

The judgment and conviction of John Henry Newsome is affirmed.

REYNOLDS, JUDGE, CONCURS.

WILHOIT, JUDGE, CONCURS AS TO BARBARA NEWSOME AND GLORIA NEWSOME; DISSENTS AS TO JOHN HENRY NEWSOME.

WILHOIT, JUDGE, DISSENTING. I respectfully dissent from that portion of the majority opinion in which they hold that the tendered instruction on "more force than was reasonably necessary" offered by appellant John Henry Newsome was properly refused by the trial court.

This instruction embodied an essential element of his theory of defense.

In essence, Newsome admitted the elements of the charge against him. He struck the victim, McBrayer, with his belt buckle repeatedly, even after being aware that the victim was no longer reacting. There was no wantonness or recklessness or accident in the fact of the contact of Newsome's belt and McBrayer's person. The contact was intentional. Newsome, however, maintained that he

thought this was necessary in order to protect himself and his daughters from serious physical harm.

Clearly there was evidence which, if believed by the jury, would support Newsome's initial motivation. There was evidence that McBrayer was intoxicated; that he approached Newsome's car in a menacing, threatening manner; that he struck and kicked Newsome when Newsome alighted from his car; that McBrayer then chased Newsome's daughters and flung one of them to the ground by her hair; that Newsome was disabled and handicapped and not at all confident of his ability to withstand McBrayer's attack.

There was evidence of McBrayer's threats to kill the Newsome family. There was additional evidence that Newsome was aware of these threats.

The jury could have believed that while his actions were intentional, his motivation was initiated by a sincere belief of necessity for defense of himself and his family. He testified that he was not aware that his daughters were stabbing McBrayer, or even that they had knives. As far as he knew, according to his testimony, his daughters were utterly helpless to the assault of McBrayer, with Newsome himself being their only defense. While there was substantial evidence against Newsome's allegations, a defendant is entitled to appropriate instructions to the jury where the evidence in any way will support his theory of defense. The decision on the facts and the application of the facts to the law must be left to the jury, and the instructions they are given to guide them must adequately cover the various aspects of the evidence.

Where a defendant confesses the commission of the act for which he is accused, but attempts to justify or excuse the act, or asserts a justification that would exonerate him or mitigate the charge against him, the court must submit his theory of defense in a clear and concrete form to the

jury. *Cf. Kohler* v. *Commonwealth,* Ky., 492 S. W. 2d 198 (1973); *Cooley* v. *Commonwealth,* Ky., 459 S. W. 2d 89 (1970); *Carnes* v. *Commonwealth,* Ky., 453 S. W. 2d 595 (1970); and *Johnson* v. *Commonwealth,* Ky., 105 S. W. 2d 641 (1937).

Appellant Newsome tendered an instruction that would allow the jury to find that he was actually motivated by self-defense, but was wanton or reckless in his failure to recognize the degree of force that was necessary for a sufficient defense to McBrayer's attack. In other words, the tendered instruction would have informed the jury on what to find if they believed that, while his physical actions themselves were intentional, those acts proceeded from a wanton or reckless belief in their necessity for the protection of himself or his daughters.

The instruction tendered by Newsome, patterned after Palmore, *Instructions to Juries,* § 10.26, was supported by sufficient evidence to warrant its submission to the jury.

The majority opinion evades this problem by stating their belief that the jury was fully informed as to all possible verdicts. Thus, instructions on murder, first degree manslaughter, second degree manslaughter, reckless homicide, first degree assault, second degree assault, a standard self-defense instruction, and appropriate definitions of terms were sufficient to inform the jury of the whole law of the case.

The majority overlooks what is, in my opinion, the crux of Newsome's defense. That is, where charged with a crime having intent as its culpable mental state, and where intent in the act itself is admitted, the jury can find the accused guilty of a crime having wantonness or recklessness as its culpable mental state if they believe that the accused was wanton or reckless in his *belief* that the degree of force he used was necessary for his protection. KRS 503.120. *See also,* Commentary, KRS 503.120;

Brickey, *Kentucky Criminal Law,* § 4.10; and Palmore, *Instructions to Juries,* Commentary to § 10.25.

In my opinion, if the instructions as given could be said to have "fully informed the jury" of the possible verdicts, they did so in an oblique and allusive manner. This is inconsistent with our law, and I would reverse and remand as to appellant John Henry Newsome.

Attorneys for Gloria Faye Newsome and Barbara Newsome:

JACK E. FARLEY
Public Advocate

LARRY MARSHALL

ERWIN LEWIS
Assistant Public Advocates
State Office Building Annex
Frankfort, Kentucky 40601

Attorneys for John Henry Newsome:

JACK E. FARLEY
Public Advocate

TIMOTHY RIDDELL
Assistant Public Advocate
State Office Building Annex
Frankfort, Kentucky 40601

Attorneys for Commonwealth:

ROBERT F. STEPHENS
Attorney General

PATRICK KIMBERLIN, III
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

ORDER DENYING PETITION FOR REHEARING

BEFORE: MARTIN, Chief Judge, REYNOLDS and WILHOIT, Judges.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

ENTERED: August 3, 1979

(s) Charles Reynolds, Judge
Court of Appeals

[LETTERHEAD OF CLERK OF COURT OF APPEALS]

CERTIFICATION

I, John C. Scott, Clerk, do hereby certify that the foregoing Order Committing the Defendants to the Department of Human Resources Until the Age of Twenty-One and Thereafter to the Custody of the Bureau of Corrections of the Floyd Circuit Court dated March 2, 1977; Amended Final Judgment of the Floyd Circuit Court dated April 25, 1978; Reversing and Remanding as to Gloria Faye Newsome—Reversing as to Barbara Newsome—Affirming as to John Henry Newsome opinion rendered May 11, 1979; Order Denying Petition for Rehearing entered August 3, 1979 in the case of Barbara Newsome and Gloria Faye Newsome v. Commonwealth of Kentucky (file no. CA-1900-MR) is a true and correct copy as same appears in my office.

Done this 6th day of August, 1979 at Frankfort, Kentucky.

John C. Scott, Clerk
By: (s) Shelley L. Ellis, Deputy Clerk
Court of Appeals of Kentucky

APPENDIX C

EXCERPTS FROM JUVENILE COURT HEARING

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than six months would not be advisable. It is a situation where we would keep this child in question in our facility longer than six months and conceivably up to a year. But certainly the time point would be at least six months and I believe under the new law the court could do this if a child is over sixteen and is being tried on a Class A or Class B felony or capital offense. But we refer to it as a Departmental bridge, if the Department does it, and a statutory brief if the court does it.

By the Court: Any other questions?

Mr. Allen: That's all we have.

(Testimony concluded)

By the Court: Now, at this time the court rules that the Commonwealth has established, pursuant to KRS 208.-170, that there is probable cause to believe that a felony has been committed, to-wit, murder; that there is probable cause to believe that the defendants have committed the said crime.

The court at this time denies the de-

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fendants' motion to put on any and all testimony for purposes of this hearing and this hearing only. The court believes that pursuant to the philosophy of KRS 208.170, and pursuant to the recent Supreme Court case of Reed v.

Jones, that once the Commonwealth establishes a probable cause that is all that is required. The defendants for the purposes of this hearing put on any evidence, the hearing in the court's opinion takes on the character of an judicatory hearing, that is to say, a hearing to determine innocence or guilt. According to Breed, if the hearing does take on the character of an judicatory hearing, then jeopardy attaches, and a transfer, if justified, is there by concluded.

The court feels that the Commonwealth has, in fact, established probable cause. The court wants to stress that is it not denying the defendants the right to put on evidence, it is simply, and only for the purposes of the nature and the character of this hearing denying that right. If the case is transferred or is not transferred, when it comes to the actual determination of guilt or innocence, the defendants will be allowed to introduce any and all relevant and competent evidence in their defense.

Mr. Rowland: As I understand it then, for the purposes of clarification for my clients, you are not ruling on guilt, you are not ruling beyond a reasonable doubt, you are ruling on probable cause to believe the defense that these people have can and should at some time be presented in order that justice may be done.

By the Court: I'm saying for purposes of this hearing only that the court feels its not allowed to take the type of evidence proffered by you; that certainly, whether it be in a judicatory hearing in the Juvenile Court or whether it be a trial in the Circuit Court, that the defendants at that time, in the innocence or guilt phase, be allowed to present any and all competent and relevant evidence in their defense.

Mr. Rowland: At this time, come the children, Barbara Newsome, and Gloria Fay Newsome, by counsel, and move the court to allow the introduction of any and all relevant evidence on their behalf, either in open court or by avowal so that a proper record for appeal can be preserved.

Mr. Allen: The Commonwealth objects to any of this.

By the Court: Is that all? Overrule your motion.

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Mr. Rowland: Object and except to the entire proceeding relating to the transferred hearing because a full hearing has not been had and the accused have not been offered the opportunity to present anything at all in their own behalf.

By the Court: Do you have a response to that, Mr. Allen?

Mr. Allen: No, Your Honor.

By the Court: The court overrules the motion for the reasons herein above stated.

Mr. Allen: Does that conclude the hearing?

By the Court: Unless Mr. Rowland has anything on the other statutory parts. You know, once there is a probable cause there's other things that has to be established and I think he's got a right to do that as long as it doesn't get into the judicatory phase.

Mr. Rowland: Object.

By the Court: At this time we have a report from Dr. John Cortello to be considered by the court and given proper weight. Did we put that in the record?

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Mr. Allen: I think that we agreed that it be filed. I don't know whether it has been filed or not.

By the Court: There is a report which the court interprets as being Purview KRS 208.140 from Mr. Charles Daniel, who has testified previously here. As I understand that Statute that shall be evidence introduced in the record. Neither one of you have probably seen that.

Mr. Rowland: No, Your Honor.

By the Court: I will give you an opportunity now to enter your objection to the introduction of that report?

Mr. Rowland: I object for the purposes of preserving

Mr. Allen: I object.

By the Court: Is there anything further?

Overrule the objections to the introduction of the report.

(Concluded)

NOTARY'S CERTIFICATE

I, Catherine Ellis, Notary Public, for the state of Kentucky, at large, certify that the evidence presented at the hearing was taken by and before me at the time and place stated in the caption; that said witnesses were first duly sworn, by the court and same was taken in shorthand notes and later transcribed on the typewriter, and the 95 pages of typewritten matter is a true and correct copy as given by said witnesses.

Given under my hand this the 24 day of September, 1976.

(s) Catherine Ellis
Notary Public

APPENDIX D

FLOYD COUNTY COURT

JUVENILE DIVISION

In the Interest of:
GLORIA FAYE NEWSOME, a Child

and

In the Interest of:
BARBARA NEWSOME, a Child

OPINION AND ORDER—Filed September 8, 1976

This Court is faced with the onerous burden and awesome responsibility of determining whether or not to transfer the cases of the two above-named children, charged with the murder of Gerald McBrayer, to the jurisdiction of the Floyd Circuit Court. The procedure for transfer is outlined in KRS 208.170, a newly-amended statute which became effective in July of this year. The statute provides, in substance, that a child, under the age of 16 years may, prior to an adjudicatory hearing, be proceeded against pursuant to a motion to transfer if he or she is alleged to have committed a capital offense or a class a felony. In the instant matters, the Commonwealth filed a timely motion to transfer the cases of both children.

The statute also provides that, if the Court believes from the evidence probable cause exists that an offense has been committed and the accused has committed it, then it should determine if it is in the best interests of the child and the community to order a transfer. Whether it is in the best interests of the child *and* the community that a transfer be made must depend and be based upon the

Court's weighing of five factors listed in the statute. They are:

1. The seriousness of the alleged offense;

2. Whether the offense was against person or property, with greatest weight being given to offenses against persons;

3. The maturity of the child, as determined by his environment;

4. The child's prior record;

5. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services, and facilities currently available to the juvenile justice system.

Unfortunately, though this statute, as opposed to its precursor, has some guidelines in assisting the Court in its determination, it does not inform it how to weigh these factors. For instance, it does not say that the Court must make five findings against the Defendants before it can order a transfer; it does not say, for example, that number one should be given more weight than number five; nor does it relate what the legislature intended by the use of the terms "reasonable rehabilitation" or "adequate protection of the public." Therefore, the weighing, inter-relating, and interpreting of these factors must be done within the framework of the broad discretion inherent in this Court.

In making this decision, the Court has considered the following evidence. The eye-witness testimony of Marcella Mullins and of the wife of the deceased.

Mrs. Mullins testified that the deceased and John Newsome, father of the defendants, were engaged in a fight and that very soon thereafter the defendants appeared with knives. They, apparently, immediately went into the deceased's apartment, where his wife was; the deceased, who was still fighting with Newsome outside the apartment, then went to the unit and removed the defendants. Once

the deceased had removed the defendants out of the apartment, they began stabbing him repeatedly and, simultaneously, began shorting obscenities at him and urging their father to kill him.

The deceased's wife also testified that she saw the defendants on top of her husband, who was in a supine position; as they were stabbing him, she heard them urge their father to kill him.

The coroner established that the deceased had been stabbed approximately 15 times.

Charles Daniels, a Juvenile Court liason worker with the Department for Human Resources, Division of Social Services, testified, that in Kentucky, there are no real lock and key institutions for girls convicted in Juvenile Court and committed to the Division. He did testify, however, that there were some reasonably-secure facilities. He testified that the law of this Commonwealth, as he understood it to be, is that if one under the age of 16 is convicted of a crime in Juvenile Court and committed to the Division, that the Juvenile Court loses jurisdiction over the child. That, though it would be unusual, the Department in a period of even less than six months could release a convicted child to be placed back in its home, or, for example, to be placed in a foster home. Mr. Daniels further testified that the Division does have, as a primary goal, the rehabilitation of all children committed to it and has several workers trained to rehabilitate committed children.

The Court, for purposes of the transfer hearing only, refused to allow the defendants' testimony as to the events immediately before, during, and after the alleged crimes; the basis of this ruling was, that if the Court had evidence from the defendants as to what transpired at those times, the evidence would change the character of the hearing; that, in fact, it would take on the character of an adjudica-

tory proceeding and, the whole purpose of KRS 208.170 would have been defeated.

The defendants introduced other evidence by stipulation. The first stipulation was to the effect that Janice Allen, a local schoolteacher, had taught both defendants; that she did not have any disciplinary problems with either of them; that both were average students and were normal persons of their age groups when she taught them.

The second stipulation was that Ruth Ann Blanton, a guidance counsellor at a local elementary school, had counselled with both defendants in the past; that her counselling was beneficial to the children; and that she considered each child to be average and normal.

Lastly, it was stipulated that William Newsome, an uncle of the defendants, was willing to have custody of them, pending an adjudication.

The Court also considered a report from Doctor John Corcella, a psychiatrist, and a joint report from the Juvenile Probation Officer and a Division of Social Services worker. Both reports are contained in the record.

The Transcript of Evidence of the proceedings, of course, can provide a more detailed analysis of the entirety of the evidence presented.

FINDINGS AND ORDER

The Court, after having been duly advised, hereby enters the following Findings and Order.

1. This Court has jurisdiction over said children by virtue of KRS 208.020(1)(a);

2. This Court is vested with the discretion to transfer its jurisdiction to the Floyd Circuit Court under certain circumstances set out in KRS 208.170;

3. Both defendants herein are under the age of 16 years;

4. Both defendants are charged with crimes which are class a felonies or capital offenses;

5. A motion to transfer was timely made by the Commonwealth prior to any adjudicatory proceedings;

6. At said transfer hearing, the Commonwealth established that there was probable cause to believe that each defendant committed the offense of murder;

7. That, based upon the following reasons, it is in the best interests of both children and the community that the cases against both be transferred to the Floyd Circuit Court:

a. The offense alleged to have been committed by each child is grave, there being none more serious in the opinion of this Court, than the taking of a human life;

b. Each child appears to be of sufficient emotional maturity to be tried as an adult;

c. The public has an interest in being adequately protected from the likelihood of the re-occurrence of the same or of the occurrence of a similar crime to that which the defendants have allegedly committed; based upon the evidence hereinabove summarized, and the entire transcript thereof, the Court finds that it is unlikely that the prospects for such protection can be offered the public with the procedures, services, and facilities currently available to the juvenile justice system; the Court does find that the Division could provide some reasonable rehabilitative services to the defendants, if tried and convicted in this Court; however, the quality of the services would be diluted by virtue of the lack of facilities to keep the defendants confined while the Division is attempting to render the same. This fact also demonstrates that the public cannot be adequately protected as hereinabove set out;

d. Even though neither of the defendants have a prior juvenile record, this fact is outweighed by the other factors hereinabove considered.

It is therefore ORDERED that the cases of each defendant be and hereby are, transferred to the Floyd Circuit Court. It is further ORDERED that, pursuant to KRS 208.170(5)(d), each of said defendants shall be forthwith taken before the Judge of said Circuit Court without unnecessary delay, for the purpose of said Court setting bail.

The Clerk of the Juvenile Court is ORDERED to forthwith transmit the entire record of the proceedings in this Court to the Clerk of the Floyd Circuit Court.

By virtue of the above, this Court does not need to consider any matter concerning the defendants' detention hearing, pursuant to the provisions of KRS 208.192. The transcript of evidence is clear as to any procedures under said statute.

(s) Richard E. Fitzpatrick
Judge, Floyd Juvenile Court

This the 8th day of September, 1976.

APPENDIX E

FLOYD CIRCUIT COURT

Indictment # 4306

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

BARBARA NEWSOME
GLORIA FAYE NEWSOME - - - - *Defendants*

ORDER COMMITTING THE DEFENDANTS TO THE DEPARTMENT OF HUMAN RESOURCES UNTIL THE AGE OF TWENTY-ONE AND THEREAFTER TO THE CUSTODY OF THE BUREAU OF CORRECTIONS

The defendants by and through their counsel having heretofore entered a plea of not guilty and the jury having been sworn to try the case whereby the defendants were charged with murder and on the 18th day of February, 1977, a verdict was returned finding the defendants guilty of Voluntary Manslaughter.

On this the 25th day of February, 1977, the defendants, Barbara Newsome and Gloria Faye Newsome, appeared in open Court with their attorney, the Honorable Claude Asbury; appearing for the Commonwealth, the Honorable James R. Allen and the Honorable Harold Stumbo. The Court inquired of the defendants and their counsel whether they had any legal cause to show why judgment should not be pronounced. The Court having afforded the attorneys an opportunity to make statements in the defendants' behalf and to present any information in mitigation of punish-

ment, the Honorable Claude Asbury having made statements in behalf of the defendants and requested that the Court consider the transferring of the defendants to the Department of Human Resources, and the Court having given due consideration to the request of the attorney for the defendants, and the Court having considered the written report of the Probation Officer which was prepared by said officer, and the Court having considered the circumstances and the nature of the crime; the history, character, and tender age of the defendants, the Court is of the opinion that the defendants, Barbara Newsome, age sixteen (16), and Gloria Faye Newsome, age fourteen (14), should be turned over to the Department of Human Resources until they reach the age of twenty-one (21) and thereafter to the Bureau of Corrections. The Court makes such finding based upon the fact:

1. That the defendants' social attitude demands that they be so confined
2. That the defendants are in need of correctional treatment which cannot be provided unless said defendants are committed to the Department of Human Resources and thereafter to the Bureau of Corrections not to exceed in all fifteen (15) years.

No sufficient cause having been shown why punishment should not be pronounced, it is ORDERED AND ADJUDGED by the Court that the defendants are guilty of the crime of Voluntary Manslaughter and that they shall be transferred to the Department of Human Resources until the age of twenty-one (21) and thereafter to the Bureau of Corrections.

It is further ORDERED AND ADJUDGED that a representative of the Department of Human Resources and the Sheriff of Floyd County, if it is so desired by the representative of

the Department of Human Resources, shall deliver the defendants to the custody of the Department at Morehead, Kentucky as soon as practical.

It is further ORDERED AND ADJUDGED that the defendants are hereby credited with the time spent in custody prior to the commencement of the time in which they are to be confined by the Department of Human Resources, this being 190 days in the Floyd County Jail.

(s) Hollie Combs, Judge
Floyd Circuit Court

March 2, 1977

AMENDED FINAL JUDGMENT—Filed May 19, 1978

It having been brought to the Court that the Final Judgment and Sentence of Imprisonment of the defendants herein failed to contain the provision whereby the Court presented to the defendants and their attorney the report of the Probation and Parole Officer, it is therefore the finding of this Court and to be made a part of the Final Judgment in that the Court provided the defendants through their counsel with a copy of the written report as prepared by the Division of Probation and Parole and the defendants agreed with the factual contents and conclusions of said report, and the Court gave due consideration to said written report before Final Judgment was entered. Therefore, the Final Judgment is amended to reveal such facts.

This the 25th day of April, 1978.

(s) Hollie Combs, Judge
Floyd Circuit Court

APPENDIX F

KRS 208.170—JUVENILE TRANSFER STATUTE

208.170. Proceedings against children suspected of felony.—(1) If, prior to an adjudicatory hearing in the juvenile court, it appears to the court that there is reasonable cause to believe that a child before the court has committed a felony, and at the time of commission of the offense the child was sixteen (16) years of age or older, or was less than sixteen (16) years of age but the offense was a Class A felony or a capital offense, and the court is of the opinion that the child be tried and disposed of under the regular law governing crimes, the court shall conduct a separate hearing to determine if the case should be transferred to the circuit court of the county in which the offense was committed. No child shall be considered a felon for any purpose until transferred to, tried and convicted of a felony by a circuit court.

(2) The hearing held to consider the transfer of a juvenile to the circuit court shall determine if there is probable cause to believe that an offense was committed and that the child committed the offense.

(3) If the court determines that probable cause exists, it shall then determine if it is in the best interest of the child and the community to order such a transfer based upon the seriousness of the alleged offense; whether the offense was against person or property, with greater weight being given to offenses against persons; the maturity of the child as determined by his environment; the child's prior record; and the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services, and facilities currently available to the juvenile justice system.

(4) If, following completion of the transfer hearing, the court is of the opinion that the best interest of the child and of the public would be protected by such transfer, the order of transfer shall state the reason for such transfer.

(5) When the juvenile court so transfers a case to the circuit court:

(a) If a grand jury considers the case and is satisfied there is sufficient evidence to indict the child, it shall be instructed that it may either return an indictment or may return a written report to the circuit court recommending that the child be transferred to the juvenile court. If the court believes that such transfer would be proper, it may order the child transferred to the juvenile court.

(b) If an indictment is returned, the court may in its discretion order the case transferred to the juvenile court.

(c) If an indictment is returned and the court does not transfer the case to juvenile court, the child shall be tried as any other defendant.

(d) While under the jurisdiction of the circuit court, the child shall be subject to bail the same as an adult. (Enact. Acts 1952, ch. 161, § 17; 1954, ch. 193, § 4, 1956, ch. 157, § 26; 1962, ch. 212, § 4; 1974, ch. 406, § 308; 1976, ch. 168, § 6.)

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NO. 80-964

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

COMMONWEALTH OF KENTUCKY — PETITIONER

VS.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

BARBARA NEWSOME, and
GLORIA FAYE NEWSOME — RESPONDENTS

* * * * * * * * * * *

The respondents, Barbara Newsome and Gloria Faye Newsome, ask leave to file the attached Respondents' Brief in Opposition to the Supreme Court of Kentucky without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The respondents were permitted to proceed as indigents by the Supreme Court of Kentucky. The respondents' affidavits in support of this motion are attached hereto.

Respectfully submitted,

ERWIN W. LEWIS
ASSISTANT PUBLIC ADVOCATE
COMMONWEALTH OF KENTUCKY
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601

Erwin W. Lewis
COUNSEL FOR BARBARA NEWSOME

LARRY H. MARSHALL
ASSISTANT PUBLIC ADVOCATE

Larry H. Marshall
COUNSEL FOR GLORIA FAYE NEWSOME

NO. 80-964

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

COMMONWEALTH OF KENTUCKY,

Petitioner,

vs.

BARBARA NEWSOME and
GLORIA FAYE NEWSOME,

Respondents.

AFFIDAVIT

I, Barbara Newsome, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs of fees:

1. I am the petitioner in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I have been allowed to proceed in forma pauperis through all stages of my case.

Further the affiant saith not.

Barbara Gentches Newsome
BARBARA NEWSOME

Duly witnessed and sworn
to before me, a notary public,
this 9th day of Dec,
1981.

Hazel Perkins
Notary Public,
My Commission expires:

HAZEL PERKINS
Notary Public, Kentucky State at Large
My Commission Expires Feb. 22, 1982

NO. 80-964

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

COMMONWEALTH OF KENTUCKY,

Petitioner,

vs.

BARBARA NEWSOME and
GLORIA FAYE NEWSOME,

Respondents.

AFFIDAVIT

I, Gloria Faye Newsome, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs of fees:

1. I am the petitioner in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I have been allowed to proceed in forma pauperis through all stages of my case.

Further the affiant saith not.

Gloria Faye Newsome
GLORIA FAYE NEWSOME

Duly witnessed and sworn
to before me, a notary public,
this 07 day of January,
1981.

Melton W. Hubbard
Notary Public, At Large State Ky.
My Commission expires: 09-05-84

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NO. 80-964

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

COMMONWEALTH OF KENTUCKY — PETITIONER

VS.

BARBARA NEWSOME, and
GLORIA FAYE NEWSOME — RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

RESPONDENTS' BRIEF IN OPPOSITION

ERWIN W. LEWIS
ASSISTANT PUBLIC ADVOCATE
COMMONWEALTH OF KENTUCKY
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601

Erwin W. Lewis
COUNSEL FOR BARBARA NEWSOME

LARRY H. MARSHALL
ASSISTANT PUBLIC ADVOCATE

Larry H. Marshall
COUNSEL FOR GLORIA FAYE NEWSOME

JANUARY 12, 1981

QUESTION PRESENTED

WHETHER A JUVENILE HAS A DUE PROCESS RIGHT TO TESTIFY AND PRESENT EVIDENCE AT HER TRANSFER HEARING.

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KRS 507.020..... 1, PASSIM

KRS 507.030..... 2, PASSIM

CR 76.28(4)(c)..... 11

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the Fourteenth Amendment and KRS 208.170(2) and KRS 208.170(3), the following constitutional and statutory sections are involved:

1) The Sixth Amendment to the United States Constitution, which reads in pertinent part: "In all criminal prosecutions the accused shall enjoy the right...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

2) KRS 208.170(1), which reads in part: "If...it appears to the court that there is reasonable cause to believe that a child before the court has committed a felony, and at the time of the commission of the offense the child...was less than sixteen (16) years of age but the offense was a Class A felony or a capital offense...the court shall conduct a separate hearing to determine if the case should be transferred to the circuit court of the county in which the offense was committed."

3) KRS 507.020, which reads:

> (1) A person is guilty of murder when:
>
> (a) With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. However, nothing contained in this section shall constitute a defense to a prosecution for or preclude a conviction of manslaughter in the first degree or any other crime; or

(b) Under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.

(2) Murder is a capital offense.

4) KRS 507.030, which reads:

(1) A person is guilty of manslaughter in the first degree when:

(a) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or

(b) With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in subsection (1)(a) of KRS 507.020.

(2) Manslaughter in the first degree is a Class B felony.

5) KRS 208F.010(2), which reads:

(2) If the Commonwealth sustains its burden of proving the existence of at least one (1) of the foregoing factors, the child shall be transferred to the circuit court to be tried as a youthful offender, except that the child may present to the court reasons why he should not be transferred to the circuit court.
eff. 7-1-82.

STATEMENT OF THE CASE

Respondents do not agree with the statement of the facts as related by the petitioner. A much more fair account of what occurred on August 23, 1976, can be found in the opinion of the Court of Appeals of Kentucky, which is part of petitioner's Appendix B, p. 25-30 (hereinafter designated PA).

More pertinent to the issue presented by petitioner is that which occurred at the Newsome girls' hearing to transfer jurisdiction from juvenile court to circuit court. This hearing was held on September 4, 1976.

Marcella Mullins was the first witness called by the Commonwealth. She testified that on the night of August 23 she, Mr. and Mrs. Sam Goodman, and Gerald McBrayer were sitting on her car listening to the C.B. when John Henry Newsome drove up (Transcript of the Transfer Hearing, hereinafter designated TTH 20-21). McBrayer walked to Newsome's car and shortly thereafter a fight broke out (TTH 21).

The two men fought for a time, after which Mullins "seen the Newsome girls downstairs with their knives" (TTH 22). They ran toward the McBrayer apartment, a door slammed, McBrayer ran toward his apartment" and then I seen him bring the girls out" (TTH 23). The fight between the men began again, and the Newsome girls "started stabbing and stabbing and stabbing" (Id.).

James Carter, Floyd County Coroner, testified that Gerald McBrayer died as a result of "multiple stab wounds in the chest, back and abdomen, with a hunting knife and butcher knife" (TTH 60).

Geraldine McBrayer, Gerald's wife, stated that on August 23 at around 9:30 "I didn't know that anything was happening. I had had my bath and I went to the door and I saw him lying on the ground and three of them were over top of him" (TTH 67). She ran and called the police, and while making the call, a girl she believed to be Barbara ran in and cut her (TTH 69).

After her testimony, the juvenile court held that "there is probable cause to believe that the defendants have committed the felony...Those are the prerequisites to our going into the next aspect of the transfer proceedings" (TTH 77).

Counsel for the girls objected, stating that he wanted to "make the record by avowal" (Id.). Counsel stated that he understood that "the proceeding is closed as to probable cause" (TTH 78).

The juvenile court clarified that his ruling on probable cause merely meant "probable cause insofar as the primafacie [sic] Commonwealth burden. That still leaves to you by calling them as witnesses" (TTH 78-79).

The Commonwealth then called Charles Daniel, a Juvenile Court Liason Specialist with the Department For Human Resources. He explained that Kentucky did not have a penitentiary for juveniles "which encompass a lock-and-key kind of situation" (TTH 82). The facilities available for juveniles were described as "reasonably secure from a standpoint of supervision and observation" (TTH 83). He agreed that there were juveniles in the facilities in his area who had been adjudicated guilty of class A crimes (TTH 86).

The juvenile court then ruled that there was probable cause to believe that a murder had been committed and that the Newsome girls had committed it. Further, he stated that he was denying "the defendants' motion to put on any and all testimony for purposes of this hearing and this hearing only" (TTH 91-92). The reason for this was that if the girls had put on any evidence, the hearing "takes on the character of an judicatory [sic] hearing...According to Breed, if the hearing does take on the character of an judicatory [sic] hearing, then jeopardy attaches, and a transfer, if justified is thereby concluded" (TTH 92).

The juvenile court went on to note that the denial of the right to introduce evidence was "only for the purposes of the nature and the character of this hearing...If the case is transferred or is not transferred, when it comes to the actual determination of guilt or innocence, the defendants will be allowed to introduce any and all relevant and competent evidence in their defense" (Id.).

Counsel for the girls then moved the juvenile court "to allow the introduction of any and all relevant evidence on their behalf, either in open court or by avowal so that a proper record for appeal can be preserved" (TTH 93). After the motion was overruled, counsel objected "to the entire proceeding relating to the transferred [sic] hearing because a full hearing has not been had and the accused have not been offered the opportunity to present anything at all in their own behalf" (TTH 94).

The next day, September 8, 1976, the juvenile court entered its order transferring the Newsome girls to Circuit Court. In that order, the juvenile court stated that it was considering evidence of the crime solely from the two Commonwealth witnesses, Marcella Mullins and Geraldine McBrayer (Transcript of the Record, hereinafter designated TR 26). It further stated that at the transfer hearing it had "refused to allow the defendants' testimony as to the events immediately before, during and after the alleged crimes" (TR 27). It noted further that "the defendants introduced other evidence by stipulation." This included evidence from a school teacher, a guidance counselor, and an uncle (TR 28). Finally, the juvenile court noted that there was probable cause to believe the girls had committed a Class A felony (TR 29).

The Newsome girls were indicted for murder on September 9, 1976 (TR 2). Their trial took place in February of 1977. Prior to trial, counsel again objected to the exclusion of evidence at their transfer hearing, stating that:

> had the defendants testify [sic] together with any witnesses that might have been subpoenaed for them, it would have showed that they acted under duress; not only did they act under duress but they believed that they were only doing that which was responsible or what they should do to protect their father who was about to be and was assaulted and that the deceased was the aggressor and brought it about, and without their defense being offered in that Court this transfer should never have been effected... (TE 35).

The girls were tried on February 14, 1977. They were convicted of first degree manslaughter and were sentenced to fifteen (15) years in prison by the jury (TE 784). The trial court, however, committed them to the Department For Human Resources, rather than the Bureau of Corrections (TR 53-55).

The Newsomes appealed their convictions to the Kentucky Court of Appeals. The primary issue they raised was the failure of the juvenile court to allow them to testify at their transfer hearing.

On May 11, 1979, the Kentucky Court of Appeals held that "at a transfer hearing held pursuant to KRS 208.170, the accused child has not only the right to hear the evidence and cross-examine the witnesses, but also the right to present evidence and to be heard" (PA 41). The Court also stated that it knew "of no other instances where due process is an element of a hearing that only one side of the evidence may be presented, and that the very individual whose rights, welfare, and interests are at stake finds herself muzzled and silenced, and forced to sit mute while evidence and orders are meted out" (PA 39). This holding was based upon the rights to counsel, to be heard, to present a defense, and generally to due process of law.

Not content with this holding, the Commonwealth sought review of this decision before the Kentucky Supreme Court. While that Court granted review, they affirmed the lower court in an unpublished opinion, stating that, "A hearing in which the accused is deprived of the right to speak in his or her own behalf cannot be adjudged 'fair.' Nor can it be said that the juvenile court, in issuing the order, was acting 'in the best interest of the child,' and prescribed by KRS 208.170(3), when it lacked what could constitute highly pertinent information about the crime and the accused" (PA 20).

SUMMARY OF REASONS FOR DENYING THE WRIT

I.

The Kentucky Supreme Court based its decision substantially upon an interpretation of KRS 208.170(3), holding that a juvenile judge should hear evidence from the juvenile in order to decide what is in the best interests of the child and society. The decision thus rests upon an adequate state ground, and review by this Court is not warranted.

II.

The decision by the Kentucky Supreme Court that a child has a right to testify and present evidence at her transfer hearing as a matter of due process and fair treatment is consistent with past decisions by this Court.

III.

Petitioner has not stated as a reason for granting the writ the inconsistency of the decision below with decisions of other state courts of last resort. There are a number of state court decisions with which the decision below is consistent. This creates no reason for this Court to exercise its jurisdiction in this case.

IV.

The decision below is unpublished. Further, the Kentucky transfer statute has been replaced by a new juvenile code, which takes effect on July 1, 1982, which appears to allow children to present evidence at their transfer hearing. These two facts limit the impact of the decision below to the two respondents, rendering unnecessary the exercise of jurisdiction by this Court.

REASONS FOR DENYING THE WRIT

I.

THE OPINION BELOW IS BASED SUBSTANTIALLY UPON AN INTERPRETATION OF THE KENTUCKY JUVENILE STATUTE, CONSTITUTING AN ADEQUATE STATE GROUND JUSTIFYING THE DENIAL OF JURISDICTION BY THIS COURT.

On appeal before the Kentucky appellate courts, respondents urged that their testimony was relevant not only to the question of whether they had committed a Class A felony, but also whether it was in their best interest to be tried as adults. While petitioner has from the beginning of this litigation attempted to limit this case only to the probable cause question, both appellate courts included the best interests issue in their opinions.

Significantly, the Kentucky Supreme Court clearly did not reserve its holding to the fact that a child has a right to testify as a matter of fundamental fairness under the due process clause of the Fourteenth Amendment at the probable cause phase of the transfer hearing. The Court also explicitly held that under KRS 208.170(3), a juvenile court needs to hear evidence from the child.

> Nor can it be said that the juvenile court, in issuing the order, was acting "in the best interest of the child," as prescribed by KRS 208.170(3), when it lacked what could constitute highly pertinent information about the crime and the accused. (PA 20).

It is important to observe that this second holding of the Kentucky Supreme Court relies in its entirety upon KRS 208.170(3). That Court is holding that a juvenile court, under KRS 208.170(3), in order to make a proper determination of the best interests of the child and society, must hear evidence from the child if offered. There is no reliance upon the due process clause in this part of the Court's holding.

Respondents submit that the opinion below, therefore, rests in substantial part upon the Kentucky Supreme Court's interpretation of KRS 208.170(3). This Court has consistently "adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." Herb v. Pitcairn, 324 U.S. 117, 126 (1945); Henry v. State of Mississippi, 379 U.S. 443, 446 (1965). Because the decision of the Kentucky Supreme Court rests in substantial part upon its interpretation of the state juvenile statute, this Court should not grant this petition for a writ of certiorari.

II.

THE OPINION BELOW IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

Petitioner wants this Court to review the decision of the Kentucky Supreme Court for the reason that the lower court "misconstrued and misapplied McKeiver v. Pennsylvania, supra, and In re Gault, supra, to the probable cause phase of a juvenile transfer hearing in Kentucky." Significantly, however, petitioner points to no language in either decision with which the Kentucky Supreme Court holding can be deemed to be inconsistent. Thus, petitioner is asserting no ground for which this Court should exercise its limited jurisdiction.

Furthermore, the decision of the Kentucky Supreme Court is quite consistent with the pronouncements of this Court

regarding state procedures in juvenile courts. In Kent v. United States, 383 U.S. 541, 562 (1966), this Court held that a transfer hearing "must measure up to the essentials of due process and fair treatment." Fair treatment, in that context, meant that a hearing must be held where the child is represented by counsel who is able to advocate for that child.

In re Gault, 387 U.S. 1 (1967) used this same standard in the context of a juvenile adjudicatory hearing, holding that due process and fair treatment required timely notice of the charges, the attachment of counsel, the opportunity to confront and cross-examine accusers, and the privilege against self-incrimination.

McKeiver v. Pennsylvania, 403 U.S. 528 (1971) reaffirmed the applicability of the due process and fair treatment standard, while holding that a jury trial was not required in an adjudicatory hearing.

These cases all stand for the proposition that due process and fair treatment are the touchstones for judging procedures established in the juvenile courts of the states. The Kentucky Supreme Court held that the juvenile court in the instant case violated that standard when it refused to allow the Newsome girls to take the stand at their transfer hearing.

Respondents submit that this holding, rather than misconstruing prior decisions of this Court, in fact, affirms the spirit of those decisions. Holding that a child be allowed to take the stand allows the child to controvert that which the state is trying to do to him or her. In the present case, for example, had Barbara and Gloria Newsome been allowed to testify, they could have shown that they could not be transferred because their crime was a Class B as opposed to a Class A felony.[1] Basic fairness demands that a child be allowed to counter that which is being alleged by the Commonwealth.

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[1]Under KRS 208.170(1), a child under the age of sixteen (16) can only be transferred if there is probable cause to believe that she has committed a Class A felony. In the context of the present case, only if the Newsomes committed murder (KRS 507.020) rather than first degree manslaughter (KRS 507.030) could they be tried as adults. The major distinction between murder and first degree manslaughter is the presence of

Basic fairness would also allow that a child should have a right to be heard before a precious right, the right to be treated as a child, is taken from her. In re Oliver, 333 U.S. 257 (1947). It would allow a child to have her counsel do more than cross-examine witnesses; that counsel could affirmatively assert a defense, present witnesses, and present the testimony of the child herself. All of these comport with basic fundamental fairness. None misconstrues this Court's prior decisions. Accordingly, there is no reason for this Court to grant this petition for the writ of certiorari.

III.

THE OPINION BELOW IS CONSISTENT WITH PRIOR DECISIONS OF STATE COURTS OF LAST RESORT.

The decision of the Kentucky Supreme Court allowing a child to present evidence at her transfer hearing is consistent with a number of decisions of other state courts of last resort. State v. Womack, Tenn.App., 591 S.W.2d 437, 444 (1979); D.H. v. State, 76 Wis.2d 286, 251 N.W.2d 196, 202 (1977); McKeever v. State, Okl.Cr., 565 P.2d 703, 705 (1977); Summers v. State, Ind., 230 N.E.2d 320, 325 (1967). In contrast, petitioner has not alleged the inconsistency of the opinion below with any other state court's decision as a reason to grant the writ. In this posture, it is apparent that this issue is not one which is interpreted in many different ways by the state courts, thereby giving another indication that a petition for the writ of certiorari is not appropriate in this case.

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1 cont'd.

extreme emotional disturbance in the latter. Evidence of extreme emotional disturbance was presented to the jury by the Newsome girls at their trial, and they were convicted of first degree manslaughter rather than murder. This same evidence was not presented to the juvenile court, and the juvenile court thereby found that there was probable cause to believe that murder had been committed, having heard no evidence, purposefully, of first degree manslaughter.

IV.

THE OPINION BELOW WILL HAVE LITTLE OR NO IMPACT IN KENTUCKY BECAUSE THE OPINION IS UNPUBLISHED AND BECAUSE A NEW JUVENILE CODE WILL TAKE EFFECT ON JULY 1, 1982.

Petitioner states that "[t]he juvenile has not in the past been given the right as a matter of law to present witnesses or to testify in her own behalf..." (Petition, p. 10). This past tradition has been changed, according to the petitioner, by the decision in the present case.

> We submit that a "mini-trial" type situation will arise in nearly every juvenile waiver case which will be time-consuming since there appears to be no limitation on discovery procedures or other evidence which may be brought forth by the juvenile. (Petition, p. 14).

The writ should therefore be granted, again according to petitioner, due to the dramatic change being wrought upon the Kentucky juvenile justice system by this decision of the Kentucky Supreme Court.

There are a number of things wrong with this, which again indicates no justifiable reason to review the decision below. First of all, respondents disagree with the assertion that in the past children have not been allowed to present evidence at their transfer hearings. No case, statute, study, or report is cited to support petitioner's description of past juvenile practice in Kentucky. Indeed, it is probable that there are no decisions on point in Kentucky because children have rarely been denied the opportunity to testify and present evidence at their transfer hearings.

Secondly, the decision of the Kentucky Supreme Court in this case is not to be published. Thus, the dread impact of this opinion on the Kentucky juvenile system predicted by petitioner is fanciful. See Kentucky Rule of Civil Procedure 76.28(4)(c).

Finally, the 1980 Kentucky legislature recently rewrote the entire juvenile code in Kentucky, to take effect on July 1, 1982. One of the new provisions is KRS 208F.010(2),

which provides that in a hearing held to decide if a child will be classified as a "youthful offender" and tried as an adult, he or she will be able to "present to the court reasons why he should not be transferred to the circuit court." While obviously this language is yet to be interpreted, respondents submit that the legislature has codified that which the Kentucky Supreme Court held in its opinion below. Petitioner's fear of the impact of that decision on the juvenile justice system in Kentucky is therefore highly misplaced in light of a new statutory provision which will accomplish the same thing.

CONCLUSION

The Kentucky Supreme Court's decision holding that a child has a right to testify and present evidence at her transfer hearing is not only a sound decision interpreting a state statute but is also a decision that is consistent with past opinions of this Court and other state courts of last resort. Further, in light of the fact that a new juvenile code has been passed in Kentucky and that the opinion below is not to be published, the decision of the Kentucky Supreme Court will have little impact on anyone other than Barbara and Gloria Faye Newsome. For these reasons, this Court should deny the petition for a writ of certiorari to the Kentucky Supreme Court.

Respectfully submitted,

Erwin W. Lewis

ERWIN W. LEWIS
ASSISTANT PUBLIC ADVOCATE
COMMONWEALTH OF KENTUCKY
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601

COUNSEL FOR BARBARA NEWSOME

Larry H Marshall

LARRY H. MARSHALL
ASSISTANT PUBLIC ADVOCATE

COUNSEL FOR GLORIA FAYE NEWSOME